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With Biden Executive Order, a U.S. Outbound Investment Control Regime Takes an Important Step Forward – Focused on China, but Significant Steps Remain Before Implementation

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On August 9, 2023, the Biden Administration issued its long-awaited Executive Order ("EO")[1] outlining controls on outbound U.S. investments in certain Chinese entities, although without imposing any immediate new legal obligations or restrictions. Uniquely, this EO was accompanied by an Advance Notice of Proposed Rulemaking ("ANPRM")[2] issued by the U.S. Department of the Treasury ("Treasury"), the agency tasked with primary implementation authority for the EO. The ANPRM provides further details about the contours of the potential requirements and restrictions to come, but seeks significant public input to assist in the crafting of the final text of the forthcoming regulations, which could still be months away from actual implementation.

The proposed new restrictions largely track recent reports that the Biden Administration would focus on a narrow set of high technology sectors, imposing an outright ban on a small set of transactions and requiring notification to the U.S. government on a broader set of others. Specifically, the Administration's directive focuses on direct and indirect investments by "U.S. persons" in a "covered foreign person," which the EO and ANPRM define to consist of Chinese, Hong Kong and Macau entities engaged in the business of targeted "national security technologies and products" (all terms defined and discussed below). As anticipated, the targeted sectors include:

1. **Semiconductors and Microelectronics;**
2. **Quantum Information Technologies; and**
3. **Artificial Intelligence ("AI") Systems.**

The text of the EO makes clear that these efforts are directly intended to combat efforts by countries of concern to "eliminate barriers between civilian and commercial sectors and military and defense industrial sectors, not just through research and development, but also by acquiring and diverting the world's cutting-edge technologies, for the purposes of achieving military dominance."[3]

It is critical to consider these new proposed regulations within the context of, and as a further outgrowth of, the broader geopolitical tensions between the United States and its allies and China. This proposed regime is just one of a number of levers of economic statecraft that the United States has used and almost certainly will continue using pursuant to its overall national security strategy vis-a-vis China. As such, while there are wholly unique elements to this program, distinct from traditional trade controls imposed by the

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United States (*e.g.*, export controls on commodities, software, and technology; U.S. sanctions programs restricting transactions with specified parties or regions; and inbound foreign direct investment controls under the Committee on Foreign Investment in the United States ("CFIUS")),[4] these proposed outbound investment rules draw to a large extent upon elements from each of these other regulatory regimes, but create another layer and channel of controls, specifically targeting the flow of capital and intangible benefits—identified in the ANPRM as "managerial assistance, access to investment and talent networks, market access, and enhanced access to additional financing"[5]—that often accompany such investments to sectors of the Chinese economy that are perceived as threats to the national security of the United States.

As such, these additional rules should be viewed holistically with other trade-related regulations, and will no doubt add to the complexity of the compliance challenges facing companies today. As just one example, while these proposed rules contemplate an exception for certain investments in publicly traded securities or exchange-traded funds ("ETFs") (discussed below), other active U.S. sanctions against certain Chinese companies currently listed on the Office of Foreign Assets Control's Non-SDN Chinese Military-Industrial Complex Companies List prohibit U.S. persons from engaging in "the purchase or sale of any publicly traded securities, or any publicly traded securities that are derivative of such securities or are designed to provide investment exposure to such securities" of the named companies.[6] As this example illustrates, companies must view contemplated business activity through multiple regulatory lenses, including these new rules, once implemented.

1. **When Do the Proposed New Rules Come Into Effect?**

There is no effective date set as of yet, and considering both the extended timeline which comes with a proposed rulemaking process, as well as the broad list of 83 specific questions which Treasury has posed to the public for comment in this first set of proposed rules, we anticipate that it may be some time before the final rules are implemented.

As noted above, neither the EO nor the ANPRM directly implements new restrictions or obligations. Rather, drawing upon the authority granted to the President in the International Emergency Economic Powers Act ("IEEPA")[7] and the National Emergencies Act,[8] the EO directs the U.S. Secretary of the Treasury, in coordination with the Department of Commerce and other heads of U.S. government departments and agencies, to issue regulations giving effect to the requirements outlined in the EO.

This is somewhat of a unique approach in the context of an IEEPA-based EO, which is explicitly designed to afford the Executive Branch the ability to implement rules quickly in response to a national emergency, without proceeding through the standard administrative stages.

In terms of next steps, the corresponding ANPRM opens a 45-day window to allow for public comment that is scheduled to close on September 28, 2023. At some undefined point after public comments are received and digested, Treasury will issue a Proposed Notice of Rulemaking setting out the near-final version of the regulations and allowing for one more period of public comment. The actual rules will come into effect at some point after that public comment period ends, which is very likely months away.

In broad strokes, the EO and accompanying proposed rules aim to establish a program that will:

1. Prohibit "U.S. persons" from directly or indirectly entering into certain types of transactions with a "covered foreign person" engaged in activities involving the specified "covered national security technologies and products"; and
2. Require notification to Treasury by "U.S. persons" who directly or indirectly enter into the same types of transactions for a broader set of defined "covered national

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security technologies and products."[9]

Below we address each of these key defined elements in more detail, as well as discuss some of the currently proposed exceptions.

2. **To Whom Do the Rules Apply?**

The ANPRM proposes to adopt the definition of "U.S. person" set out in the EO, which comports with the standard definition in U.S. sanctions practice, and includes "any United States citizen, lawful permanent resident, entity organized under the laws of the United States or any jurisdiction within the United States, including any foreign branches of any such entity, and any person in the United States."[10] Notably, this definition does not include foreign subsidiaries of U.S. businesses directly, but the ANPRM proposes rules that would place obligations on U.S. parents, or other controlling U.S. entities, to enforce the rules at their non-U.S. controlled entities.

Specifically, the ANPRM anticipates requiring U.S. persons to (1) notify Treasury of "any transaction by a foreign entity controlled by such United States person that would be a notifiable transaction if engaged in by a United States person" and (2) "take all reasonable steps to prohibit and prevent any transaction by a foreign entity controlled by such United States person that would be a prohibited transaction if engaged in by a United States person."[11] Such reasonable steps could explicitly include the following:

1. Relevant binding agreements between a U.S. person and the relevant controlled foreign entity or entities;
2. Relevant internal policies, procedures, or guidelines that are periodically reviewed internally;
3. Implementation of periodic training and internal reporting requirements;
4. Implementation of effective internal controls;
5. Testing and auditing function; and
6. The exercise of governance or shareholder rights, where applicable.[12]

Treasury proposes to define "controlled foreign entity" as "a foreign entity in which a U.S. person owns, directly or indirectly, a 50 percent or greater interest."[13]

In addition, the EO calls for prohibitions on U.S. persons "knowingly directing" transactions which would be prohibited for a U.S. person to conduct itself.[14] The ANPRM proposes to define this standard to capture actions where a U.S. person "orders, decides, approves, or otherwise causes to be performed a transaction that would be prohibited under these regulations if engaged in by a U.S. person," and the U.S. person has "actual knowledge, or should have known, about the conduct, the circumstance, or the result."[15] Sanctions practitioners may note this appears to be very similar to the standard anti-"facilitation" provisions found in most U.S. sanctions regulations, although notably here, the standard for liability is knowledge.

The EO and ANPRM also contain prohibitions against any activity, whether engaged in by U.S. or non-U.S. persons, designed to evade the rules or which cause a violation of the rules. An open question at this point is whether, and to what extent, such "causation" provisions create diligence obligation on foreign funds or other entities which are not controlled by U.S. persons but in which U.S. persons are invested.

Importantly, the ANPRM envisions excluding "the provision of a secondary, wraparound, or intermediary service or services such as third-party investment advisory services, underwriting, debt rating, prime brokerage, global custody, or the processing, clearing, or sending of payments by a bank, or legal, investigatory, or insurance services," which is a narrower range of restrictions than afforded in the EO.[16]

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3. **Do the Proposed Rules Only Impact Investments in China? Who Is a "Covered Foreign Person" and What Is a "Country of Concern"?**

While the final rules are likely to have wide impact on the covered sectors, the annex to the EO makes the target of these restrictions clear, specifically naming the People's Republic of China, including the Special Administrative Regions of Hong Kong and Macau, as the only "country of concern" identified to date.[17] This approach aligns with the Biden Administration's description of China as its "pacing challenge" in its recent National Security Strategy.[18] While the structure of the ANPRM allows for the addition of other countries in the future, the recent actions are clearly targeted at stemming the flow of capital and accompanying intangible benefits to China in the targeted sectors of national security concern. These efforts are expected to work in tandem with the Biden Administration's implementation of expansive export controls on semiconductor manufacturing technology, advanced integrated circuits, and supercomputers in October 2022.[19] Through both efforts, the focus has clearly been to target China's civil-military fusion through which critical technologies and products are used to aid in the development of China's military, intelligence, surveillance, and cyber-enabled capabilities.[20]

Treasury has proposed to define "covered foreign person" to mean:

1. A "person of a country of concern" that is engaged in, or a "person of a country of concern" that a U.S. person knows or should know will be engaged in, an identified activity with respect to a "covered national security technology or product"; or
2. A person whose direct or indirect subsidiaries or branches are referenced in item (1) and which, individually or in the aggregate, comprise more than 50 percent of that person's consolidated revenue, net income, capital expenditure, or operating expenses.[21]

The definition of "person of a country of concern" under consideration by Treasury is broad, and would include the following:

1. Any individual that is not a U.S. citizen or lawful permanent resident of the United States and is a citizen or permanent resident of a "country of concern";
2. An entity with a principal place of business in, or an entity incorporated in or otherwise organized under the laws of a "country of concern";
3. The government of a "country of concern," including any political subdivision, political party, agency, or instrumentality thereof, or any person owned, controlled, or directed by, or acting for or on behalf of the government of such "country of concern"; or
4. Any entity in which a person or persons identified in items (1) through (3) holds individually or in the aggregate, directly or indirectly, an ownership interest equal to or greater than 50 percent.[22]

Importantly, Treasury is seeking comment on whether these definitions should be changed or elaborated upon and what the impact, intended or not, of the definitions as they stand could be.

4. **What Constitutes a "Covered Transaction"?**

The definition of "covered transaction" would apply equally to "prohibited transactions" and "notifiable transactions" discussed in detail below and, as proposed, would include a U.S. person's direct or indirect:

1. Acquisition of an equity interest or contingent equity interest in a covered foreign person;
2. Provision of debt financing to a covered foreign person where such debt financing

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is convertible to an equity interest;

3. Greenfield investment that could result in the establishment of a covered foreign person; or
4. Establishment of a joint venture, wherever located, that is formed with a covered foreign person or could result in the establishment of a covered foreign person.[23]

In a departure from most sanctions programs administered by Treasury, which typically apply a strict liability standard, the ANPRM states that a "knowledge standard" could be adopted across the program.[24] Borrowing from the knowledge standard most often employed by the Department of Commerce's Bureau of Industry and Security in the context of export controls, a U.S. person would "need to know, or reasonably should know" from an appropriate amount of due diligence, "that it is undertaking a transaction involving a covered foreign person and that the transaction is a covered transaction."[25] Importantly, knowledge would also be inferred from a conscious or willful avoidance of facts.[26]

Additionally, the application of this definition will not be retroactive and will not cover "transactions and the fulfillment of uncalled, binding capital commitments with cancellation consequences made prior to the issuance" of the EO.[27] The ANPRM does, however, forewarn that in order to further develop the outbound investment program, Treasury may request information from U.S. persons concerning transactions that were "completed or agreed to after the date of the issuance of the [EO]."[28] Moreover, the ANPRM clearly articulates Treasury's focus on targeting indirect transactions and attempts to evade the restrictions through the use of third parties as conduct that will be prohibited, citing the example of a "U.S. person knowingly investing in a third-country entity that will use the investment to undertake a transaction with a covered foreign person that would be subject to the program if engaged in by a U.S. person directly."[29]

While the breadth of covered transactions may at first glance seem daunting, the ANPRM proposes the following activities will be excluded from the operative definition, so long as they do not clearly meet the definitional elements and are not undertaken for the purpose of evasion:

1. University-to-university research collaborations;
2. Contractual arrangements or the procurement of material inputs for any of the "covered national security technologies or products" (such as raw materials);
3. Intellectual property licensing arrangements;
4. Bank lending;
5. Processing, clearing, or sending of payments by a bank;
6. Underwriting services;
7. Debt rating services;
8. Prime brokerage;
9. Global custody;
10. Equity research or analysis; or
11. Other services secondary to a transaction.[30]

"Excepted transactions," discussed in more detail below, would also be excluded.

Based on the above exclusions, financial institutions may be able to continue to provide certain financial services to a "covered foreign person," potentially including certain capital market activities such as advising on, underwriting, or carrying out an initial public offering. The ANPRM notes that Treasury is considering excluding some of these activities (such

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as third-party investment advisory services and underwriting) from the definition of "directing" for the purpose of the prohibition on U.S. persons "knowingly directing transactions."[31] These exclusions suggest that Treasury does not intend to significantly restrict the ability of financial institutions to provide services to "covered foreign persons" provided that they avoid the express prohibitions outlined above. For example, ordinary bank lending may ultimately be unaffected, provided the bank ensures that under no circumstances will it acquire an equity interest in a "covered foreign person" as a result of the lending (*e.g.*, the bank declines to take a charge over equity in a "covered foreign person" as security for a loan).

Questions undoubtedly remain, and Treasury seeks further input on what types of transactions will ultimately fall within the definition of "covered transactions," as well as how to address debt financing, unintended impacts on investment flows, the role of follow-on transactions, and what secondary or intermediary services may be captured under the proposed definition, among other topics.

5. **What are the "Covered National Security Technologies and Products" That Fall Within "Covered Transactions"? Which Transactions Will Be Prohibited and Which Will Be Subject to Notification Requirements?**

As noted above, the ANPRM envisions an outright prohibition on "U.S. persons" undertaking "covered transactions" with "covered foreign persons" engaged in specified activities related to "covered national security technologies and products," while imposing a notification requirement for others.

The EO defines "covered national security technologies and products" to mean sensitive technologies and products in the following sectors: (1) semiconductors and microelectronics, (2) quantum information technologies, and (3) AI capabilities, that are "critical for the military, intelligence, surveillance or cyber-enabled capabilities of a country of concern."[32] This language clearly indicates that the end-use of a technology or product will, therefore, be relevant in determining if the transaction constitutes a "covered transaction" involving "covered national security technologies and products." For example, an AI product that exclusively has commercial marketing uses would be unlikely to fall within the definition of "covered national security technologies and products," as the ANPRM clearly acknowledges that the definition "may be limited by reference to certain end uses of those technologies or products," as applicable.[33]

The specific technologies and products that are expected to fall within the new restrictions are set out in the table below:

<table>
<tr><th colspan="2">Semiconductors and Microelectronics[34]</th></tr>
<tr><th>Proposed Notifiable Transactions</th><th>Proposed Prohibited Transactions</th></tr>
<tr><td>(1) Integrated Circuit Design: The design of integrated circuits for which transactions involving U.S. persons are not otherwise prohibited.

(2) Integrated Circuit Fabrication: The fabrication of integrated circuits for which transactions involving U.S. persons are not otherwise prohibited.

(3) Integrated Circuit Packaging: The packaging of integrated circuits for which transactions involving U.S. persons are not otherwise prohibited.</td><td>(1) Technologies that Enable Advanced Integrated Circuits

• Software for Electronic Design Automation: The development or production of electronic design automation software designed to be exclusively used for integrated circuit design.

• Integrated Circuit Manufacturing Equipment: The development or production of front-end semiconductor fabrication equipment designed to be exclusively used for the volume fabrication of integrated circuits.

(2) Advanced Circuit Design and Production

Advanced Integrated Circuit Design: The design of integrated circuits that exceed the thresholds in Export Control Classification Number ("ECCN") 3A090, or integrated circuits designed for operation at or below 4.5 Kelvin.</td></tr>
</table>

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	Advanced Integrated Circuit Fabrication: The fabrication of integrated circuits (defined as the process of forming devices such as transistors, poly capacitors, non-metal resistors, and diodes, on a wafer of semiconductor material) that meet any of the following criteria: (i) Logic integrated circuits using a nonplanar transistor architecture or with a technology node of 16/14 nanometers or less, including but not limited to fully depleted silicon-on-insulator (FDSOI) integrated circuits; (ii) NOT-AND (NAND) memory integrated circuits with 128 layers or more; (iii) Dynamic random-access memory (DRAM) integrated circuits using a technology node of 18 nanometer half-pitch or less; (iv) Integrated circuits manufactured from a gallium-based compound semiconductor; (v) Integrated circuits using graphene transistors or carbon nanotubes; or (vi) Integrated circuits designed for operation at or below 4.5 Kelvin. • **Advanced Integrated Circuit Packaging**: The packaging of integrated circuits that support the three-dimensional integration of integrated circuits, using silicon vias or through mold vias, where "packaging of integrated circuits" is defined as the assembly of various components, such as the integrated circuit die, lead frames, interconnects, and substrate materials, to form a complete package that safeguards the semiconductor device and provides electrical connections between different parts of the die. (3) Supercomputers: The installation or sale to third-party customers of a supercomputer, which are enabled by advanced integrated circuits, that can provide a theoretical compute capacity of 100 or more double-precision (64-bit) petaflops or 200 or more single-precision (32-bit) petaflops of processing power within a 41,600 cubic foot or smaller envelope.
Quantum Information Technologies[35]	
Proposed Notifiable Transactions	**Proposed Prohibited Transactions**
None are currently contemplated.	(1) Quantum Computers and Components: The production of a quantum computer (defined as a computer that performs computations that harness the collective properties of quantum states, such as superposition, interference, or entanglement), dilution refrigerator, or two-stage pulse tube cryocooler. (2) Quantum Sensors: The development of a quantum sensing platform designed to be exclusively used for military end uses, government intelligence, or mass-surveillance end uses. (3) Quantum Networking and Quantum Communication Systems: The development of a quantum network or quantum communication system designed to be exclusively used for secure communications, such as quantum key distribution.
AI Systems[36]	
Proposed Definition: The ANPRM acknowledges the continued difficulty with defining AI and proposes to limit the restrictions to those transactions involving an "AI system," defined as "an engineered or machine-based system that can, for a given set of objectives, generate outputs such as predictions, recommendations, or decisions influencing real or virtual environments. AI systems are designed to operate with varying levels of autonomy."[37]	
Proposed Notifiable Transactions	**Proposed Prohibited Transactions**

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The development of software that incorporates an AI system and is designed to be exclusively used for: (i) Cybersecurity applications, digital forensics tools, and penetration testing tools; (ii) The control of robotic systems; (iii) Surreptitious listening devices that can intercept live conversations without the consent of the parties involved; (iv) Non-cooperative location tracking (including international mobile subscriber identity (IMSI) Catchers and automatic license plate readers); or (v) Facial recognition. The ANPRM also contemplates the phrasing “primarily used” in lieu of “exclusively used.”	The development of software that incorporates an AI system and is designed to be exclusively used for military, government intelligence, or mass-surveillance end uses. The ANPRM also contemplates the phrasing “primarily used” in lieu of “exclusively used.”

Of the 83 questions posed by Treasury in the ANPRM, 23 are directed at defining the semiconductors and microelectronics, quantum information technologies, and AI systems that should fall within the proposed restrictions, clearly indicating that the categories and subcategories of “covered national security technologies and products” are likely to change in the final rule and are notably areas in which Treasury is actively seeking public participation.

Treasury is also seeking comment on whether investment by U.S. persons in these areas may provide a strategic benefit to U.S. national security and whether modifications should be made to the technical scope and definitions under consideration.

For transactions falling within the notification requirements, Treasury is proposing that U.S. persons must file the required notifications “no later than 30 days following the closing of a covered transaction.”[38] As currently envisioned, notifications would require, at minimum, the following information:

1. The identity of the person(s) engaged in the transaction and nationality (for individuals) or place of incorporation or other legal organization (for entities);
2. Basic business information about the parties to the transaction, including name, location(s), business identifiers, key personnel, and beneficial ownership;
3. The relevant or expected date of the transaction;
4. The nature of the transaction, including how it will be effectuated, the value, and a brief statement of business rationale;
5. A description of the basis for determining that the transaction is a “covered transaction”—including identifying the “covered national security technologies and products” of the “covered foreign person”;
6. Additional transaction information including transaction documents, any agreements or options to undertake future transactions, partnership agreements, integration agreements, or other side agreements relating to the transaction with the “covered foreign person” and a description of rights or other involvement afforded to the “U.S. person(s)”;
7. Additional detailed information about the “covered foreign person,” which could include products, services, research and development, business plans, and commercial and government relationships with a “country of concern”;

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8. A description of due diligence conducted regarding the investment;
9. Information about previous transactions made by the "U.S. person" into the "covered foreign person" that is the subject of the notification, as well as planned or contemplated future investments into such "covered foreign person"; and
10. Additional details and information about the "U.S. person," such as its primary business activities and plans for growth.[39]

The information would be provided via a portal hosted on Treasury's website (likely similar to Case Management System ("CMS") currently used for CFIUS filings), and the ANPRM notes that Treasury is currently evaluating the "appropriate confidentiality requirements and restrictions around the disclosure of any information or documentary material submitted or filed" as part of the disclosure process.[40]

6. **What Carveouts Are Contemplated? How Might This Impact Non-U.S. Funds That Accept Investors Who Are U.S. Persons?**

Importantly, the proposed outbound investment regime is not a "catch and release" program, and in contrast to the mandatory filing requirements under CFIUS, Treasury has clearly stated that it is "not considering a case-by-case determination on an individual transaction basis as to whether the transaction is prohibited, must be notified, or is not subject to the program."[41] Rather, the onus will be on the parties to a given transaction to determine whether the prohibitions or notification requirements apply.

Treasury is, however, contemplating a category of "excepted transactions" that present a lower likelihood of concern and would be excluded from the definition of "covered transactions." Such "excepted transactions" would include:

1. Various types of common investments such as the following:
    - Investments in publicly traded securities, index funds, mutual funds, ETFs, or similar instruments (including associated derivatives) offered by an investment company or by a private investment fund; and
    - Solely passive investments by a limited partner ("LP") into a venture capital fund, private equity fund, fund of funds, or other pooled investment funds below a de minimis threshold to be set by Treasury.
2. Acquisitions of equity or other interest owned or held by a "covered foreign person" in an entity or assets located outside of a "country of concern" where the "U.S. person" is acquiring all interests in the entity or assets held by "covered foreign persons";
3. An intracompany transfer of funds from a U.S. parent company to a subsidiary located in a "country of concern"; or
4. A transaction made pursuant to a binding, uncalled capital commitment entered into before the date of the EO.[42]

Notwithstanding the above, if an investment described in (1) above provides a U.S. person rights beyond ordinary "minority shareholder protections" such investment will not be considered an "excepted transaction."[43] Examples of such additional rights provided in the ANPRM include:

1. Membership or observer rights on, or the right to nominate an individual to a position on, the board of directors or an equivalent governing body of the "covered foreign person"; or
2. Any other involvement, beyond the voting of shares, in substantive business decisions, management, or strategy of the "covered foreign person." [44]

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The categories of “excepted transactions” are potentially quite broad and would allow U.S. persons to continue to invest, with some restrictions, in “covered foreign persons,” particularly where the investment is indirectly made through a fund. The exemptions above may be particularly relevant to managers of ETFs, some of which may have considerable exposure to certain “covered foreign persons” because such entities are included on an index tracked by the ETF.

The proposed new rules likely present some additional considerations for non-U.S. person general partners of non-U.S. private funds if the fund allows any U.S. person LPs. In such circumstances, the parties will likely need to consider how to diligence and negotiate investments and investment structures to obtain comfort that the U.S. investors do not run afoul of their legal obligations.

In addition to the “excepted transactions” discussed above, the ANPRM contemplates exempting transactions that are in the “national interest of the United States,” that may be allowed despite falling within the final restrictions.[45] Such transactions would be permitted if determined by the Secretary of the Treasury, in consultation with the heads of other agencies, as appropriate, that they would:

1. provide an extraordinary benefit to U.S. national security; or
2. provide an extraordinary benefit to the U.S. national interest in a way that overwhelmingly outweighs relevant U.S. national security concerns.[46]

Importantly, Treasury is not “considering granting retroactive waivers or exemptions (*i.e.*, waivers or exemptions after a prohibited transaction has been completed).”[47]

7. **What Will Enforcement Look Like and What Happens Next?**

While the EO envisions both civil and criminal penalties for violations of the proposed regulations,[48] the ANPRM focuses on civil penalties, as is standard, with potential criminal activities being referred to the U.S. Department of Justice. The ANPRM proposes imposing penalties up to the maximum allowed under IEEPA (currently US $ 356,579 per violation)[49] for the following:

1. Material misstatements made in or material omissions from information or documentary material submitted or filed with Treasury;
2. The undertaking of a prohibited transaction; or
3. The failure to timely notify a transaction for which notification is required.[50]

Importantly, the EO also gives the Secretary of the Treasury the power to “nullify, void, or otherwise compel the divestment of any prohibited transaction entered into after the effective date of the regulations.”[51] Treasury has made clear that they will not look retroactively to transactions that were not prohibited at the time of their completion, but they reserve the right to request information from parties to cover investments that were completed subsequent to the effective date of the EO.[52]

As noted above, it will likely be some time before the final rules take shape. Even after the final rules are determined following the rounds of public comment anticipated over the next several months, the EO requires the Secretary of the Treasury to provide the President with a report on the effectiveness of the regulations and recommendations for improvement within one year of the issuance of the final rules, and at least annually thereafter.[53] And while not required, the EO also authorizes the Secretary of the Treasury “to submit recurring and final reports” to Congress, who, on their own accord, may also impose additional reporting requirements through separate legislation.[54] These reporting requirements indicate that the final restrictions are likely to be revised and fine-tuned over time to confront emerging national security threats and concerns voiced by industry.

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8. **How Does This Fit Into the Broader Global Context?**

As widely reported, the Administration appears to have expended considerable effort to inform and engage U.S. allies in outlining the scope of the proposed restrictions. The Fact Sheet released by the U.S. Department of the Treasury specifically states that the Administration "engaged with U.S. allies and partners regarding its important national security goals, and will continue coordinating closely with them to advance these goals," indicating that outbound investment regimes may be gaining traction in other jurisdictions as well.[55] For example, in March 2023, European Commission President Ursula von der Leyen stated that "Europe should develop a targeted instrument on outbound investment,"[56] and in May 2023, leaders at the G7 Summit in Hiroshima, Japan, issued a statement recognizing that "appropriate measures designed to address risks from outbound investment could be important to complement existing tools of targeted controls on exports and inbound investments, which work together to protect . . . sensitive technologies from being used in ways that threaten international peace and security."[57]

In addition to rhetorical endorsement, the United States is not alone in taking steps to implement an outbound investment regime. In June 2023, the European Commission ("EC") and the High Representative published a Joint Communication on a European Economic Security Strategy, which, according to the accompanying press release, called upon the EC to "examine, together with Member States, what security risks can result from **outbound investments** and on this basis propose an initiative" by the end of 2023.[58] Relatedly, in its recent Strategy on China, Germany acknowledged that in the context of investments in China, "appropriate measures that are designed to counter risks connected with **outbound investment** could be important as a supplement to existing instruments for targeted controls of exports and domestic investments."[59] And following the announcement of the proposed rules, news outlets began reporting that the UK was closely watching the process and weighing whether it should follow suit with similar restrictions.[60]

9. **Is Further Congressional Action Still Possible?**

For months, both Republicans and Democrats in Congress have advocated for concrete actions to stem the flow of U.S. investments to China, particularly in industries of national security concern. Recently, the Senate voted 91 to 6 to include the Cornyn-Casey Outbound Investment Transparency Act as an amendment to the must-pass National Defense Authorization Act (the "Cornyn-Casey Amendment").[61] This amendment would require U.S. companies to notify the federal government 14 days before investing in sensitive technologies in China if the activity is not a secured transaction, and within 14 days of the activity if it is a secured transaction. The covered sectors are broader than those contemplated by the Biden Administration and would include (1) advanced semiconductors and microelectronics; (2) AI; (3) quantum information science and technology; (4) hypersonics; (5) satellite-based communications; and (6) networked laser scanning system with dual-use applications. Even prior to the Administration's recent actions, the Cornyn-Casey amendment faced headwinds from key players in both parties, with some arguing that tougher measures were needed and others claiming that such measures would be ineffective at best and advantageous to China at worst. While the legislative fate of the Cornyn-Casey Amendment and other similar measures remains to be seen in light of the actions taken by the White House, additional action by Congress in this space cannot be wholly discounted and may indeed be compatible with the Biden Administration's proposed regulations.

10. **What are the Next Steps in the Regulatory Process?**

The ANPRM provides useful insight into the likely scope and scale of the final regulations and seeks comments from the public on the final text, including 83 specific questions with which Treasury seeks input. Comments may be submitted by mail or through the Government eRulemaking portal (Regulations.gov) and must be received by September 28, 2023. Commenters have the opportunity to provide empirical data and analysis to

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support their view on "the relative benefits and costs of the recommended approach."[62] Written comments can be supplemented with requests to meet with the Treasury Department to engage in discussions on the stakeholders' views.

Following the end of the ANPRM's notice and comment period, Treasury must issue a Notice of Proposed Rulemaking ("NPRM") which signals the beginning of the standard notice-and-comment procedure. The NPRM will be published in the *Federal Register* and will include either the text of the proposed rule or a more detailed description of its content. A public comment period will be announced, which usually lasts at least 30 days, though this period can be significantly longer, depending on the issue's complexity. During the public comment period, members of the public usually have the opportunity to respond to one another's comments. Once the public comment period has expired, formal regulations are expected to follow.

11. **What Steps Can Companies Take to Prepare for the Proposed New Regulations?**

In light of these recent developments, companies contemplating outbound investments in sensitive technologies should take stock of their current position so they are prepared to act as regulations are finalized and in order to minimize the risk of becoming a target of congressional or executive branch inquiry. Specific steps companies should take include:

- **Provide Written Comments**: As part of the notice-and-comment period, the U.S. Department of the Treasury is actively soliciting public opinion on the proposed regulations. As noted previously, companies may provide comments by mail or at Regulations.gov.
- **Gain Visibility**: Understand how the company's investments work in China (and other potential "countries of concern," such as Russia). What are the company's current investments? What investments may be pending or are under consideration? What involvement do "U.S. persons" have?
- **Flag Sensitive Transactions**: Identify those investments that may benefit from additional review by the company, including any that may fall within the parameters of the proposed restrictions.
- **Establish Guardrails**: Determine where mitigating risk versus restricting investment may be most appropriate for the company and apply those guardrails throughout the company's investments in more sensitive sectors and/or regions.

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[1] Exec. Order No. 14,105, 88 Fed. Reg. 54,867 (Aug. 11, 2023).

[2] Provisions Pertaining to U.S. Investments in Certain National Security Technologies and Products in Countries of Concern, 88 Fed. Reg. 54,961 (Aug. 14, 2023) [hereinafter ANPRM].

[3] Exec. Order No. 14,105, 88 Fed. Reg. at 54,867.

[4] *See, e.g.*, Gibson, Dunn & Crutcher LLP, 2022 Year-End Sanctions and Export Controls Update (Feb. 7, 2023), https://www.gibsondunn.com/2022-year-end-sanctions-and-export-controls-update.

[5] ANPRM, 88 Fed. Reg. at 54,962.

[6] Exec. Order 14,032, 86 Fed. Reg. 30,145 (June 7, 2021).

[7] 50 U.S.C. § 1701 *et seq*.

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[8] 50 U.S.C. § 1601 *et seq*.

[9] *See* Exec. Order No. 14,105, 88 Fed. Reg. at 54,868.

[10] Exec. Order No. 14,105, 88 Fed. Reg. at 54,870; *see* ANPRM, 88 Fed. Reg. at 54,963–64.

[11] ANPRM, 88 Fed. Reg. at 54,971.

[12] *Id*.

[13] *Id*.

[14] *Id*. at 54,970–71; *see* Exec. Order No. 14,105, 88 Fed. Reg. at 54,869.

[15] ANPRM, 88 Fed. Reg. at 54,971.

[16] *Id*.; *see* Exec. Order No. 14,105, 88 Fed. Reg. at 54,869.

[17] Exec. Order No. 14,105, 88 Fed. Reg. at 54,872. Notably, Hong Kong's autonomous treatment distinct from China was formally revoked by former President Trump on July 14, 2020. *See* Exec. Order 13,936, 85 Fed. Reg. 43,413 (July 17, 2020). This determination was renewed most recently by President Biden on July 11, 2023, for one year. *See* Continuation of the National Emergency With Respect to Hong Kong, 88 Fed. Reg. 44,669 (July 12, 2023).

[18] White House, National Security Strategy 20 (Oct. 2022), https://www.whitehouse.gov/wp-content/uploads/2022/10/Biden-Harris-Administrations-National-Security-Strategy-10.2022.pdf.

[19] *See* Implementation of Additional Export Controls: Certain Advanced Computing and Semiconductor Manufacturing Items; Supercomputer and Semiconductor End Use; Entity List Modification, 87 Fed. Reg. 62,186 (Oct. 13, 2022); *see also* Gibson Dunn, United States Creates New Export Controls on China for Semi-Conductor Manufacturing Technology, Advanced Semiconductors, and Supercomputers in New Phase of Strategic Tech Competition (Oct. 13, 2022), https://www.gibsondunn.com/us-new-export-controls-on-china-for-semi-conductor-manufacturing-technology-advanced-semiconductors-in-new-phase-strategic-tech-competition.

[20] *See* ANPRM, 88 Fed. Reg. at 54,962.

[21] *Id*. at 54,964.

[22] *Id*.

[23] *Id*.

[24] *Id*. at 54,969–70.

[25] *Id*. at 54,970.

[26] *See id*. at 54,969.

[27] *Id*. at 54,964.

[28] *Id*.

[29] *Id*. at 54,964–65

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[30] *Id*. at 54,965.

[31] *Id*. at 54,971.

[32] Exec. Order No. 14,105, 88 Fed. Reg. at 54,867.

[33] ANPRM, 88 Fed. Reg. at 54,967.

[34] *Id*. at 54,967–68.

[35] *Id*. at 54,968.

[36] *Id*. at 54,968–69.

[37] *Id*. at 54,969.

[38] *Id*. at 54,970.

[39] *Id*.

[40] *Id*.

[41] *Id*. at 54,971.

[42] *See id*. at 54,965–66.

[43] *Id*. at 54,965.

[44] *Id*.

[45] *Id*. at 54,971.

[46] *Id*. at 54,972.

[47] *Id*.

[48] Exec. Order No. 14,105, 88 Fed. Reg. at 54,868, 70.

[49] *See* Inflation Adjustment of Civil Monetary Penalties, 88 Fed. Reg. 2,229 (Jan. 13, 2023).

[50] ANPRM, 88 Fed. Reg. at 54,972.

[51] Exec. Order No. 14,105, 88 Fed. Reg. at 54,870.

[52] ANPRM, 88 Fed. Reg. at 54,964, 72.

[53] Exec. Order No. 14,105, 88 Fed. Reg. at 54,868–69.

[54] *See id*. at 54,869.

[55] U.S. Dep't of the Treasury, *FACT SHEET: President Biden Issues Executive Order Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern; Treasury Department Issues Advance Notice of Proposed Rulemaking to Enhance Transparency and Clarity and Solicit Comments on Scope of New Program* (Aug. 9, 2023), https://home.treasury.gov/system/files/206/Outbound-Fact-Sheet.pdf.

[56] Ursula von der Leyen, President, European Commission, Speech on EU-China

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Relations to the Mercator Institute for China Studies and the European Policy Centre (Mar. 30, 2023), https://ec.europa.eu/commission/presscorner/detail/en/speech_23_2063.

[57] Press Release, White House, G7 Leaders' Statement on Economic Resilience and Economic Security (May 20, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/05/20/g7-leaders-statement-on-economic-resilience-and-economic-security.

[58] Press Release, European Commission & High Representative, An EU Approach to Enhance Economic Security (June 20, 2023) (emphasis in original), https://ec.europa.eu/commission/presscorner/detail/en/IP_23_3358; *see* Eur. Comm'n, Joint Communication to the European Parliament, the European Council and the Council (June 20, 2023), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52023JC0020&qid=1687525961309.

[59] Government of the Federal Republic of Germany, Strategy on China of the Government of the Federal Republic of Germany 41 (2023) (emphasis in original), https://www.auswaertiges-amt.de/blob/2608580/317313df4795e104f1ea3263d41860d8/china-strategie-en-data.pdf.

[60] *See, e.g.*, George Parker & Michael O'Dwyer, *Rishi Sunak Weighs Following Joe Biden on Curbing Tech Investment in China*, Financial Times (Aug. 10, 2023), https://www.ft.com/content/cfcfcae7-3af9-4d6f-b690-a45ea864cf5e.

[61] S. Amdt. 931 to S. Amdt. 935 to S. 2226, 118th Cong. (2023).

[62] ANPRM, 88 Fed. Reg. at 54,962.

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Gibson Dunn's International Trade lawyers are highly experienced in advising companies about the potential legal implications of their international transactions and regularly assist clients in their efforts to comply with the shifting legal landscape and to implement best practices. The firm's Congressional Investigations team has represented numerous clients responding to congressional inquiries regarding national security issues, and its Public Policy Practice Group frequently works with clients to monitor developments on Capitol Hill and the Administration in real time and to ensure their voices are heard in the policy debate. Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. Gibson Dunn attorneys also have vast experience preparing effective submissions to government regulators and remain ready to assist with this process as well as to help prepare stakeholders for discussions with members of the Treasury or other federal agencies on the proposed regulations.

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